

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

GERARDO MARTINEZ,

Defendant and Appellant.

B227215

(Los Angeles County
Super. Ct. No. BA368062)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Michael M. Johnson, Judge. Affirmed in part and reversed in part.

Verna Wefald, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Lawrence M. Daniels, Supervising Deputy Attorney General, and Colleen M.
Tiedemann, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Gerardo Martinez of first degree murder, and found true firearm and street gang allegations. The trial court found true a prior murder conviction. Martinez was sentenced to life imprisonment without possibility of parole, plus twenty-five years to life. On appeal, Martinez argues that the trial court erred when it failed to strike the testimony of a gang expert and failed to bifurcate trial on the street gang allegations, and contends that the true finding on the gang allegation is not supported by substantial evidence. We reverse the true finding on the gang allegation, and we otherwise affirm.

BACKGROUND

An information filed April 9, 2010 charged Martinez with the murder of Roberto Molina on February 10, 2002, in violation of Penal Code section 187, subdivision (a).¹ The information also alleged that Martinez personally used and intentionally discharged a firearm causing the victim's death pursuant to section 12022.53, subdivisions (b) through (d), and that the offense was committed for the benefit of a criminal street gang pursuant to section 186.22, subdivision (b)(1)(C). The information further alleged that Martinez was previously convicted of first degree murder, making him eligible for a sentence of life imprisonment without parole, pursuant to section 190.2, subdivision (a)(2).

On August 2, 2010, a jury found Martinez guilty of first degree murder, and found the firearm and street gang allegations to be true. After a court trial, the court found the prior murder conviction allegation to be true.² The trial court sentenced Martinez to life without the possibility of parole, plus 25 years to life. Martinez filed this timely appeal.

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

² In *People v. Martinez* (Jan. 7, 2008, B193631) [nonpub. opn.], we affirmed Martinez's prior conviction of first degree murder for the shooting death of Sebero Ruiz, which occurred on June 12, 2003, after the instant offense. A prior-murder special circumstance may be based upon a murder occurring after the murder in the proceeding, as "for purposes of the prior-murder special circumstance, "[t]he order of the commission of the homicides is immaterial." (*People v. Hinton* (2006) 37 Cal.4th 839, 879.)

The February 10, 2002 murder of Roberto Molina

At trial, Los Angeles Police Department (LAPD) Officer Danial Kern testified that around noon on February 10, 2002, he went to 4414 Staunton Street, near the Alameda Swap Meet and in the 38th Street gang area, in response to a radio call of assault with a deadly weapon. The victim was lying on the sidewalk on the west side of the street, with multiple gunshot wounds. Fire department personnel arrived and pronounced the victim dead. The victim's face was covered with a white T-shirt, he was wearing a gold chain with the number "38" on it, and he had a cigar in his hand. Officer Kern saw bullet impact marks and numerous shell casings that he thought were from a rifle. Three casings were near the victim, and several more were across the street.

Emerson Echeveste testified that he was tossing a football with a friend in a driveway near the swap meet at midday on February 10, 2002. Neither Echeveste nor his friend was a gang member. Echeveste heard gunshots, ran behind a gate, and looked toward 45th Street and saw "[a] guy with a gun," who he identified in court as the defendant Martinez. The gun was an AK-47, and Martinez was holding it above his chest. Echeveste saw Martinez shoot the victim, whom Echeveste had never seen before, from about a half-block away. The victim was walking back and forth on the sidewalk, and Echeveste did not see that the victim had a gun. After the victim was shot, he fell to the sidewalk, and Martinez walked closer to about 15 feet away from the victim, and shot again. Echeveste heard 10 to 15 gunshots; he was about 10 feet away from the victim. He got a good look at Martinez's face. Martinez walked away towards Vernon holding the gun by his leg pointed to the ground, hopped in on the passenger side of a gray-brown Thunderbird, and the car took off. Echeveste went and looked at the victim, who was surrounded by a lot of people. The police came and Echeveste told them what he saw.

Echeveste was interviewed in October 2006 by LAPD Detective Richard Arciniega, and identified Martinez as the shooter in a photographic lineup. He also identified Martinez as the shooter at a preliminary hearing and at trial. On cross-examination, Echeveste admitted that he had testified previously that he did not actually

see Martinez get into a car, but other people had told him that he left in the Thunderbird. He explained, "I took a quick glance [at] it."

Carlos Ledesma testified that he was tossing the football with Echeveste on the day of the shooting. He saw a man running and pointing a big gun like a rifle, and saw another man fall to the sidewalk. He heard a total of 12 gunshots. The man then ran to a car, got in the back seat, and the car drove off. Ledesma didn't see the man's face, but he was wearing a red hat and white shirt.

Arnoldo Macias testified that in February 2002, he was a member of the 38th Street gang. He was friends with another 38th Street member named Roberto Molina, whose nickname was "Silent," and they would hang out every day. On February 10, 2002, they were at the Alameda swap meet with another 38th Street member, "Youngster." Macias was rolling up a blunt when he saw a car pull up; Molina said, "'38,'" and someone in the passenger seat exchanged words with Molina. When Martinez got out of the car, Macias recognized Martinez; he knew Martinez from school. Macias used to hang out with Martinez, but they stopped hanging out because they went into rival gangs. Macias went into 38th Street, and Martinez went into Barrio Mojados, where his nickname was "Tank." Macias and Martinez had a fight a couple of years before 2002. Macias and other 38th Street members were coming home from a car show when some of the others got out of their cars and jumped Martinez. After that, when Macias saw Martinez, they would throw gang signs at each other.

Martinez had a big rifle and started shooting at Molina, who fell to the sidewalk. Martinez walked very close to Molina and shot again. Macias ran, and when he turned around the car was leaving. Macias later identified Martinez as the shooter in a photo lineup, and at trial.

Detective Arciniega testified that he assisted at the scene of the shooting. No weapons were found on Molina or in the vicinity of his body. He had been trained regarding the gangs in the area, and knew Martinez's gang moniker was "Tank." Detective Arciniega had shown a photographic lineup on different dates in October 2006 to Macias and Echeveste, and both identified Martinez as the shooter.

Detective Salaam Abdul testified that he went to the crime scene on February 10, 2002, and was assigned the case. He recovered a bullet fragment from a wooden fence and eight shell casings consistent with an assault rifle from the street. Detective Abdul was given information that the suspect was named “Tank,” but was unable to get corroborating evidence, and the case became a cold case file.

Ballistics analysis of the shell casings showed that they were fired by the same gun. The casings were consistent with a semiautomatic rifle. The coroner testified that Molina’s death was caused by multiple gunshot wounds.

Gang expert testimony

LAPD Officer Steven Torres testified that he had worked for the LAPD for seven years, had worked as a police officer for gang detectives for one week, and had worked in a gang unit for two years and eight months. In both jobs, he monitored gangs including 38th Street and Barrio Mojados. Before joining in the gang unit, he had worked patrol for five years and had encounters with hundreds of gang members.³ Officer Torres attended a three-day LAPD gang-awareness school, the LAPD gang symposium, and the California Gang Investigators Association gang conference. He gave roll call training to patrol officers on gang trends, wars, and graffiti. While in the gang unit, he worked with a senior gang officer and with gang detectives, and throughout his time on the force he came into contact with gang members nearly every day, had served search warrants on gang members 30 to 45 times, and had arrested gang members. Also on a daily basis, Officer Torres spoke to gang members about their gang lifestyle or culture, and spoke to members of communities within gang areas. Officer Torres had testified approximately 10 times as a gang expert, including testimony about 38th Street and Barrio Mojados. He had had contact with 15 to 20 Barrio Mojados members, had talked to detectives about

³ Defense counsel objected “as to time frame. I think [Torres’ testimony] is irrelevant. I don’t think he was a police officer at the time of this offense. [¶] . . . [¶] He said [he] has been with them for seven years, and this happened eight years ago.” The court said, “Well, he can explain his experiences as an officer” and overruled the defense objection.

Barrio Mojados, had investigated crimes and served search warrants involving Barrio Mojados members, and had seen gang writings and graffiti on a daily basis associated with Barrio Mojados.

During his time as a patrol officer and up to the present, he monitored the area controlled by Barrio Mojados, which was Vernon Avenue to the north, 54th Street to the south, Central Avenue to the west, and Compton Avenue to the east. Thirty-eighth Street's slightly larger territory was 33d Street to the north, 48th Place to the south, Central Avenue to the west, and Alameda to the east. Based on Officer Torres's conversations with other officers and with gang members, those territories had remained consistent since 2000.

The Alameda Swap Meet was in the heart of 38th Street gang territory. The gang controlled the swap meet, where the gang sold narcotics and weapons, and engaged in other crimes. The 38th Street gang was one of Barrio Mojados' main rivals. Barrio Mojados had been in existence since the late 1980's, had 140–150 members, and the gang's primary activities included felony vandalism, assault with a deadly weapon, robberies, narcotics sales, attempted murder, and murder. Officer Torres described hand signs and tattoos that he had seen on Barrio Mojados members.

Officer Torres testified that two convictions (for murder on December 9, 2004, and for attempted murder and murder on March 28, 2000) were of Barrio Mojados members, for crimes committed for the benefit of the gang.

Officer Torres testified that respect was very important in gang culture, and one way to gain respect was ““putting in work,”” or committing crimes for the benefit of the gang. Such crimes would send a message to rival gangs and intimidate the community. Barrio Mojados had always had an ongoing rivalry with 38th Street, and the two gangs were bitter rivals fighting for the same gang territory. Going into another gang's territory and committing a violent crime on a rival gang members rewarded the perpetrator's gang and increased its reputation.

Officer Torres opined that Martinez was a Barrio Mojados member from 2002 to the present, based on arrest reports, conversations with Detective Arciniega, and

photographs of Barrio Mojados tattoos that Officer Torres reviewed in court.⁴ Given a hypothetical mirroring the facts of this case, Officer Torres gave his opinion that the hypothetical was a rival gang shooting committed to benefit the Barrio Mojados gang.

On cross-examination, Officer Torres acknowledged that he was not working in the area in 2002, was not a police officer until 2003, and received his first gang training two years and eight months ago. He had received no training specifically regarding the Barrio Mojados and 38th Street gangs, and had not given any information about the two gangs in his roll call briefings. He had learned from other officers that Barrio Mojados was formed in the late 1980s, and the gang's name meant Wet Town. The Barrio Mojados and 38th Street territories overlapped in places. He did not know how many of each of the primary crimes had been committed by the gang in 2002 and for subsequent years. Officer Torres also did not know when the gang tattoos that he saw had been done. Officer Torres did not know Detective Arciniega in 2002, and had discussed Martinez with Detective Arciniega a month or two before his testimony. On redirect, he explained that his experience with Barrio Mojados was based on daily interactions and arrests rather than training.

Defense counsel moved to strike Detective Torres's testimony as "lack[ing] adequate foundation for him to testify as an expert." The court denied the motion: "The issues go to the weight rather than the admissibility of his opinion."

Detective Arciniega returned to the stand, and testified that he became familiar with Barrio Mojados when he worked in a gang unit from 1998 to the present, and that in 2002 there was an ongoing rivalry between 38th Street and Barrio Mojados. He testified that he had investigated cases involving violence between the two gangs, including the predicate offenses. In 2006, Martinez admitted to Detective Arciniega that he was a Barrio Mojados member, and Detective Arciniega saw "Wet Town" and "BMS" tattoos on the defendant, from which he formed the opinion that Martinez was a member of Barrio Mojados. He was not aware of any written evidence that Martinez was a Barrio

⁴ Detective Arciniega testified that he took the photographs of Martinez.

Mojados member in 2002. He had, however, seen tattoos like Martinez's on Barrio Mojados members from 1998 to the present.

Defense counsel moved to dismiss pursuant to 1118.1, stating: "I don't think the gang allegation has been proven." The court denied the motion. In closing argument, defense counsel questioned Officer Torres's qualifications as an expert, and argued that there was absolutely no proof of the gang enhancement allegation, because nothing in Officer Torres's or Detective Arciniega's testimony proved that in 2002 Martinez was a gang member, associated with gang members, or committed a crime for the benefit of a gang.

DISCUSSION

I. The trial court did not abuse its discretion in admitting Officer Torres's testimony.

Martinez argues that Officer Torres was not qualified to testify as a gang expert on the two gangs in 2002, at the time of the crime. Martinez points out that Officer Torres was not a police officer in 2002, and argues that Officer Torres based his opinions on hearsay conversations with Detective Arciniega, who also did not have documentation that Martinez was a gang member in 2002. Martinez also argues that Officer Torres was unqualified because he did not attend any seminars on Barrio Mojados or 38th Street and did not know who founded the gangs.

Before trial, defense counsel stated, "I'm not going to challenge [Officer Torres]—I will obviously cross-examine him. But there is no challenge as to his expertise. I have been given discovery. I have discussed it with him, because I would have time to pull files. He has clarified some things for me. I have no problem." During Officer Torres's testimony, however, defense counsel unsuccessfully objected on hearsay grounds to his testimony regarding the gangs in 2002 (and also objected that his testimony was "irrelevant"), his opinion that one of the defendants in the predicate offenses was a gang member, and his statement that Detective Arciniega field-identified Martinez. At sidebar, the trial court pointed out to counsel that on direct examination, the expert could state that he relied on other officers as the basis of his opinion, but testimony

about the details or content of what the other officer told him would be inadmissible hearsay. Defense counsel vigorously cross-examined Officer Torres, and moved to strike his testimony on the basis that “it lacked adequate foundation for him to testify as an expert.” Martinez adequately raised the issue.

“Evidence Code section 720 provides that a person may testify as an expert ‘if he has special knowledge, skill, experience, training, or education sufficient to qualify him,’ (*id.*, subd. (a)) which ‘may be shown by any otherwise admissible evidence, including his own testimony.’ (*Id.*, subd. (b).) The trial court’s determination of whether a witness qualifies as an expert is a matter of discretion and will not be disturbed absent a showing of manifest abuse. [Citation.] “‘Where a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than its admissibility.’” [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 321–322.) We also review the court’s ruling on the motion to strike for an abuse of discretion. (See *People v. Price* (1991) 1 Cal.4th 324, 421.) “Striking a witness’s entire testimony is, of course, a ‘drastic solution,’ only to be employed ‘after less severe means are considered.’ [Citations.]” (*Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 736.)

The trial court did not abuse its discretion in refusing to strike Officer Torres’s testimony. The jury was entitled to rely on expert testimony about gang culture and habits to reach a finding that a crime was committed for the benefit of a gang under section 186.22, subdivision (b)(1)(C). (*People v. Gardeley* (1996) 14 Cal.4th 605, 617.) Personal observation and discussions with gang members, as well as information from other officers and from the police department’s files, are sufficient foundation for the opinion of a police officer testifying as a gang expert. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370.) Investigative experience may be an adequate basis for gang expert testimony. (*People v. Williams* (1997) 16 Cal.4th 153, 195.) Further, an expert’s testimony may rely on hearsay: “Expert testimony may be founded on material that is not admitted into evidence and on evidence that is ordinarily inadmissible, such as hearsay, as long as the material is reliable and of a type reasonably relied upon by experts

in the particular field in forming opinions. [Citation.] Thus, a gang expert may rely on conversations with gang members, his or her personal investigations of gang-related crimes, and information obtained from colleagues and other law enforcement agencies. [Citations.]” (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1463–1464; see Evid. Code, § 801.)

That Officer Torres was not a police officer until a year after Molino was murdered in 2002 does not in itself disqualify him from testifying as an expert regarding gangs in the area where Molino was shot. Based on his conversations with other officers and with gang members, he testified that the gang territories remained consistent since 2000. Officer Torres’s lack of personal knowledge regarding Barrio Mojados in 2002 was pointed out to the jury and goes to the weight of his testimony, not whether he was qualified to testify at all. The court properly instructed the jury that they should determine the weight to give the expert testimony by considering the qualifications and the believability of the witness and the facts, materials, and reasons on which each opinion was based, and that they could disregard any opinion they found unreasonable.

“Error regarding a witness’s qualifications as an expert will be found only if the evidence shows that the witness “‘clearly lacks qualification as an expert.’” [Citation.]” (*People v. Farnum* (2002) 28 Cal.4th 107, 162.) The court did not abuse its discretion in denying the motion to strike Officer Torres’s testimony.

Martinez also argues that the evidence against him was weak, so that without Torres’s testimony there is a reasonable likelihood that he would not have been convicted. We have already concluded that the testimony was properly admitted. Further, we disagree that the evidence against Martinez was weak. Echeveste, an eyewitness, identified Martinez as the shooter. Macias, another eyewitness and a 38th Street member, testified that he recognized Martinez when Martinez got out of the car and exchanged words with the victim. Macias identified Martinez as the shooter. Macias also testified that Martinez was someone he knew in high school and had hung out with until Martinez joined Barrio Mojados, a rival gang, and he had fought with Martinez a couple of years before 2002. Two eyewitnesses identified Martinez as the murderer, and

one identified him as a Barrio Mojados member. There was sufficient evidence to convict Martinez without Officer Torres’s testimony.

II. The prosecution failed to prove a pattern of gang activity.

Martinez further contends that there was insufficient evidence to support the street gang enhancement. Even viewing the evidence in the light most favorable to the judgment (*People v. Kraft* (2000) 23 Cal.4th 978, 1053–1054), we conclude it was insufficient to support the jury’s true finding on the gang allegation. There was not substantial evidence that Barrios Mojados engaged in a “pattern of criminal gang activity” as required by section 186.22, subdivision (e).⁵

The indictment alleged that the offense was committed for the benefit of a criminal street gang under section 186.22, subdivision (b)(1)(C). Section 186.22, subdivision (f), defines “criminal street gang” as, among other characteristics, a group “whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.” Subdivision (e) provides: “As used in this chapter, ‘pattern of criminal gang activity’ means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, *provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense*, and the offenses were committed on separate occasions, or by two or more persons.” (§ 186.22, subd. (e), italics added.) Murder is among the listed offenses. (*Id.* at subd. (e)(3).) The charged crime may constitute one of the statutorily required “two or more” predicate offenses, but “[c]rimes occurring *after* the charged offense cannot serve as predicate offenses to prove a pattern of criminal gang activity.” (*People v. Duran, supra*, 97 Cal.App.4th at pp. 1457–1458.) Certified court records are admissible as an official record to prove the fact of the conviction and the commission of the underlying offense. (*Id.* at p.1461.)

⁵ We requested, and the parties provided, supplemental briefing on this issue.

The prosecution introduced certified copies of the minute orders in the homicide convictions of Romulo Nava, Jr., convicted on December 9, 2004, and Jose Martin Escobedo, convicted on March 28, 2000. There was no testimony regarding the date of commission of either offense. The documents indicate that the complaint charging Nava was filed on June 17, 2003, and charged Nava with having committed the offense of murder on or about June 12, 2003; Nava was convicted on December 9, 2004. The documents also show that the information charging Escobedo was filed on June 10, 1999, and alleged that he committed the offense of murder and attempted murder on or about November 26, 1998.

Nava's crime cannot serve as one of the two predicate offenses required to show a pattern of gang activity, because Nava's crime occurred in 2003, *after* the offense in this case, which occurred on February 10, 2002. (*People v. Duran, supra*, 97 Cal.App.4th at p. 1458.) Further, although Escobedo's crime occurred before the current offense and the current offense can serve as one of the predicate offenses (*ibid.*), Escobedo's crime occurred on November 26, 1998, more than three years before February 10, 2002, the date of Martinez's offense.

The prosecution nevertheless argues that because Escobedo's *conviction* on March 28, 2000 was within three years of Martinez's *commission* of the instant offense on February 10, 2002, the statute has been satisfied. We disagree. Section 186.22, subdivision (e) requires that "at least one of these offenses *occurred* after the effective date of this chapter and the last of those offenses *occurred* within three years after a prior offense." (Italics added.)⁶ The record shows that Escobedo's offense *occurred* on November 26, 1998, after the statute's effective date of September 26, 1988 (see *People*

⁶ The jury was instructed in similar language that a pattern was existed if "at least one of those crimes occurred after September 26, 1988, and the last of those crimes occurred within three years after a prior offense"

v. Loeun (1997) 17 Cal.4th 1, 8), and the last of the offenses (Martinez’s instant offense) occurred more than three years later, on February 10, 2002.⁷

The evidence is insufficient to support the true finding on the street gang enhancement.

II. The trial court did not abuse its discretion in denying bifurcation.

Martinez argues that the trial court abused its discretion when it denied his motion to bifurcate trial on the gang enhancement allegation. We disagree.

Although “[t]he Legislature itself has specifically recognized the potential for prejudice when a jury deciding guilt hears of a prior conviction . . . [,] the Legislature has given no indication of a similar concern regarding enhancements related to the charged offense, such as a street gang enhancement.” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) “Evidence of the defendant’s gang affiliation—including evidence of the gang’s territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.] To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary.” (*Id.* at pp. 1049–1050.) Further, even when evidence would be inadmissible at the trial of the substantive crime as unduly prejudicial when no gang enhancement is alleged, the court may still deny bifurcation: “[T]he trial

⁷ Because we conclude the prosecution failed to prove this essential element of the gang enhancement, we do not address Martinez’s arguments that other elements of the enhancement were not supported by substantial evidence.

We note that the jury was not instructed that Martinez’s crime could serve as one of the predicate offenses. The lack of such an instruction is reviewed for harmless error. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.) Because the jury found Martinez guilty of murder, had the jury been properly instructed we have no doubt they would have concluded that his offense qualified as one of the offenses listed in the statute. At any rate, because we conclude that the evidence of a pattern of criminal gang activity was insufficient, the failure to give such an instruction was harmless beyond a reasonable doubt.

court's discretion to deny bifurcation of a charged gang enhancement is similarly broader than its discretion to admit gang evidence when the gang enhancement is not charged.” (*Id.* at p. 1050.)

Here, the trial court could reasonably have concluded that the gang evidence in this case was relevant to the substantive offense (murder), showing that Martinez had a motive to shoot Molina at the swap meet in broad daylight because they were members of rival gangs, and that violence in 38th Street territory would promote respect for Barrio Mojados. The gang evidence was not so inflammatory that its prejudice outweighed its probative value, given the strong evidence of Martinez's guilt (two eyewitnesses' testimony and identification). Martinez has not established that there was a substantial danger of undue prejudice requiring separate trials. The trial court did not abuse its broad discretion in refusing to bifurcate, and Martinez's constitutional rights were not violated as the trial was not rendered fundamentally unfair.

DISPOSITION

The true finding on the gang enhancement allegation is reversed. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

CHANEY, J.